No. 08-1329

Supreme Court, U.S.
FILED
MAY 29 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

FIA CARD SERVICES, N.A.,
Successor in interest to MBNA CORPORATION,

Petitioner,

v.

LINDA S. PARKS, Trustee,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When, within 90 days of filing a petition in bankruptcy, a bankruptcy debtor accesses credit from one credit card and uses the newly acquired funds to pay a different credit card debt, is this a preferential payment under 11 U.S.C. § 547 which the Trustee can avoid or can the credit card company that was paid on the eve of bankruptcy label the payment a bank-to-bank transfer and retain funds that could not be retained by any other creditor?

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11 U.S.C. § 547 i

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. A, 1a-15a), dated December 30, 2008, is officially reported at 550 F.3d 1251 (10th Cir. 2008).

The Memorandum Opinion and Order of the United States District Court for the District of Kansas (App. B, 16a-40a), dated February 26, 2008, is officially reported at Case No. 05-18216; Adv. No. 06-5181 (D. Kan. 2008).

The Memorandum Opinion and Order of the United States Bankruptcy Court for the District of Kansas (App. C, 41a-57a), dated July 23, 2007, is officially reported at 372 B.R. 511 (Bankr. D. Kan. 2007).

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its opinion on December 30, 2008. This brief in opposition of the petition for writ of certiorari has been filed within 30 days of docketing as required by Supreme Court Rule 15.3. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Procedural History

The Respondent does not dispute the Petitioner's recitation of the procedural history in this matter with the exception that the United States District Court for the District of Kansas entered its Opinion on February 26, 2008.

B. Statement of Facts

The Debtors had two credit card accounts with MBNA (accounts 6264 and 7781) and two credit card accounts with Capital One – a Platinum MasterCard account with a $30,000.00 line of credit and a Platinum Visa account with a $25,000.00 line of credit. On July 27, 2005, the Debtors directed Capital One to pay MBNA $17,000.00 on their 6264 MBNA account through a balance transfer from their Capital One Platinum MasterCard account. On the same day, they directed Capital One to pay MBNA the sum of $21,000.00 on the 7781 MBNA account through a balance transfer from their Capital One Platinum Visa account.

REASONS FOR DENYING THE WRIT

I. The Tenth Circuit's ruling followed the precedent established by the Supreme Court of the United States.

In the months before their bankruptcy, the Debtors accessed credit available to them from one of

their creditors, Capital One. Though they could have used the funds to buy a boat or to have extra cash, Debtors decided to use the funds to pay down their MBNA credit card balance. Though its marketing materials likely suggested that many ways in which having more cash (and going further into debt) would make the Debtors' lives richer and more fulfilling, Capital One, the lender, did not dictate how the funds were to be used.

The Tenth Circuit specifically analyzed *Begier v. IRS*, 496 U.S. 53, 55-56, 110 S. Ct. 2258 (1990), when it recognized that these recently accessed funds, acquired at Debtors' discretion and spent at Debtors' direction, were property of the Debtors' bankruptcy estate. (Opinion, App. A, 6a-7a). The Petitioner credit card company misguidedly suggests a parallel between these Debtors' funds and the tax payments at issue in *Begier*. Here, the available credit was the Debtors' credit. The funds they accessed were their funds that they themselves opted to use to pay their MBNA debt.

In contrast, in *Begier v. IRS*, the funds at issue were taxes the airline had collected from customers and withheld from employees' wages. 496 U.S. at 55-56. The only reason the airline had collected the funds was to pay them to the IRS. The court in *Begier* ruled that the funds did not become the airline's property because the airline never owned them – they were always held in trust for the IRS. *Id.* at 67.

The Tenth Circuit examined whether the Debtors exerted dominion/control over the balance transfers in this case and whether or not there was a diminution in the bankruptcy estate as a result of the transfers. The Tenth Circuit determined that the transactions in this case were disguised by technology, but were the same as if the Debtors had drawn on a line of credit, deposited the funds into their account, and then wrote a check to MBNA – the Debtors had control over the funds. (Opinion, App. A, 10a-11a). Because the transfer occurred within the Bankruptcy Code's look back period, the Tenth Circuit determined that those monies were subject to recapture by the bankruptcy estate. (Opinion, App. A, 14a).

Because the Tenth Circuit correctly applied the principles outlined in *Begier*, the ruling in this matter does not merit review.

II. This case does not involve a direct bank-to-bank transfer of funds and, as a result, the decision of the Tenth Circuit is not in conflict with the Fifth Circuit.

The Tenth Circuit explicitly rejected the credit card company's attempts to mislabel this as a bank-to-bank transfer. (Opinion, App. A, 13a). A bank-to-bank transfer of consumer debt is one in which one bank agrees to purchase consumer debt from another bank. Capital One and MBNA never had an agreement to purchase the Debtors' debt.

Debtors, not the banks, transferred these funds. Debtors contacted Capital One to access their available credit. Debtors directed where the funds would be paid. In response to Debtors' instructions, Capital One paid Debtors' MBNA credit card bill. Had Debtors instructed Capital One to pay their bill at Kansas Dry Cleaning or Joe Local's Bar, the payment would have been retrieved by the Trustee as a preferential transfer. This is not a bank-to-bank transfer – it is a transfer of Debtors' funds by Debtors to a creditor.

The only other Appellate Circuit Court confronted with similar facts has reached the same conclusion as the Tenth Circuit reached here. *See, e.g., Yoppolo v. MBNA America Bank, N.A. (In Re Dilworth)*, 560 F.3d 562 (6th Cir. 2009).

In the Fifth Circuit decision that the Petitioner credit card company offers as evidence of a conflict amongst the circuits, *Coral Petroleum, Inc. v. Banque Paribas-London, et al.*, the loan was made on the condition that the funds would be used only for one purpose. 797 F.2d 1351, 1353-1354 (5th Cir. 1986). The funds never became property of the estate because they had never been under the control of the bankruptcy debtors. *Id.* at 1361-1362. The petition for certiorari should be denied as this Court is not faced with a split amongst the circuits.

CONCLUSION

For the foregoing reasons, the Petitioners have presented no compelling reason for this Court to review this case; accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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